

AGENDA
WASHINGTON EFSEC STANDARDS DEVELOPMENT GROUP
Wednesday, March 27, 2002
11:00 a.m. – 4:00 p.m.
St. Placid's Priory, 500 College Street NE, Lacey, Washington
Phone 360/438-2595

1. Welcome and introductions
2. Review of last meeting's minutes
3. Presentations
 - A. Noise—Dave Bricklin
 - B. Wetlands—Chuck Blumenfeld
 - C. Fish and Wildlife—Gary Sprague
 - D. Water Quantity—Chuck Lean
4. Next meeting and organization of remaining work

March 27, 2002

EFSEC Standards Development Group

Meeting Minutes

Lacey, Washington

Introduction

Sister Billie introduced the Priory to visitors.

Review of February 28, 2002 Meeting

The minutes of the February 28, 2002 meeting were approved with one change on the third page in the second paragraph. The term “unregulated” PUDs was changed to “locally or commission regulated” PUDs.

Process – If Standards Met

Bud Krogh raised the question of how the process for siting power plants should mesh with the standards. Essentially, what effect does a “meets standards” determination have on the overall EFSEC process, and more specifically, the State Environmental Policy Act (SEPA) and adjudicative hearing requirements?

Chuck Blumenfeld commented that the processes should be integrated. If a project meets standards, does a SEPA Determination of Non-Significance (DNS) or a Mitigated DNS (MDNS) follow? Would the “meets standards” determination qualify a project for “expedited processing”, as provided for in the statute? If not, would a project then have to go through the whole process, i.e., SEPA EIS and adjudicative hearing? Mr. Blumenfeld stated that he felt EFSEC had a lot of latitude in settling the breadth of the adjudicative hearings, and if the hearing was necessary, a “meets standards” determination could serve to limit the scope of the hearings on certain issues. Discussion followed on the relationship of the SEPA decision to the rest of the process. The idea of using a Programmatic EIS on a set of standards was raised and will be looked at further.

Darrel Peeples questioned what EFSEC would do if all parties had stipulated to all of the issues. Responses indicated that an applicant would still be expected to put on a prima facie case that would present basic support for the application through exhibits and witness testimony. It was noted that while the Council would consider stipulation agreements, it is not bound to accept them.

Allen Fiksdal clarified that this group’s focus is on electric generating facilities, rather than all the other types of facilities that could come before EFSEC.

Mike Lufkin will provide additional thoughts on the process options to the group at a future meeting.

Wetlands Discussion

Mr. Blumenfeld presented a summary of wetlands regulations, reviewing the federal, state, and local regulatory authorities and processes; issues related to delineating Exhibit B(5)—Report to Jim Luce, Chair, Washington Energy Facility Site Evaluation Council

March 27, 2002 EFSEC Standards Development Group Meeting Materials

Page 2 of 2

wetlands; Corps of Engineers (Corps) criteria for filling wetlands; and the role of the Department of Ecology in EFSEC projects.

Jim Boldt asked what EFSEC's role is in relationship to the Corps waiting to issue its permit until after the Council certifies consistency with coastal zone management and water quality standards. Could EFSEC get the locals and Ecology to expedite their reviews? Mr. Fiksdal responded that EFSEC supersedes other agencies and would address the wetlands requirements in its recommendation to the Governor. Once a project was approved, EFSEC would convey the State's "certification" to the Corps. Mr. Fiksdal continued that the Council would coordinate with Ecology and other state and local agencies and the parties to determine if a project would meet state and local substantive requirements for a broad range of environmental areas, including wetlands. Mr. Krogh and Mr. Boldt offered that a proactive role on the front-end of the process would seemingly avoid problems later on. Mr. Fiksdal noted that the preliminary site study process encourages a potential applicant to work with staff and interested parties which can lead to settlement of issues before an application is formally filed with the Council.

Mr. Luce stated that the Earl Report proposes a more active role for EFSEC staff in managing the process, and developing recommendations to the Council, while recognizing a more active role would require additional staff and budget. One of the legislative changes to RCW 80.50 in 2001 was a provision that EFSEC staff could be more active in developing recommendations to the Council. Mr. Luce noted that this is more in line with the staff roles in the Oregon and California siting processes.

Mr. Blumenfeld commented that this is an issue that goes beyond wetlands. The EFSEC Chair and Governor's Office can encourage agencies to devote staff early on in the process, but agencies are reluctant to dedicate resources until there is sufficient information on a proposed project.

Mr. Blumenfeld continued that there are no defined standards for setting what is appropriate mitigation for filling wetlands areas. There are some guidelines, but generally the mitigation is based on negotiated settlements. Mr. Luce stated that this group could help define standards, with a high degree of specificity that would let applicants know what level(s) of mitigation would be required. Dave Bricklin pointed out that first there would need to be a threshold decision whether to allow filling at all at the proposed site. It was noted that local ordinances should identify what areas should or should not be filled.

Discussion followed on the difficulty of developing wetlands standards because federal, state, and local agencies all approach wetlands differently, and each site has its own unique set of variables. Mark Anderson offered that the group could look at establishing guidelines that would recognize existing local land use regulations as the standards "floor". Gary Sprague responded that the Department of Fish and Wildlife had prepared a paper in the mid-1990's that identified different wetland types and ratios, and that might be a good starting point. He added that long-term monitoring would be needed to determine if goals had been met. Mr. Peebles stated it was his experience that applicants would prefer putting money up front and getting closure versus long-term monitoring obligations.

Mr. Krogh asked Mr. Blumenfeld to work with the several group members who indicated a willingness to assist in the development of proposed standards to present at the next meeting.

Noise Discussion – Dave Bricklin

Dave Bricklin summarized his handout on noise standards for Washington State and Oregon. In Washington, the State Legislature delegated the responsibility for developing noise standards to the Department of Ecology, but only with general direction. The Ecology standards preempt local standards, unless different requirements are “necessitated by special conditions.” Some local jurisdictions rely exclusively on Ecology’s standards, while others have noise ordinances that prohibit “nuisance” noise. While there are lots of ways to measure noise, Mr. Bricklin said he has never seen a local ordinance with anything other than the system that Ecology has chosen (the dBA system). EFSEC’s standards for addressing noise are basically non-existent. Oregon’s system of regulating noise is more refined than Washington’s. Grant Bailey mentioned that there is no noise enforcement staff at Ecology anymore, so local regulations prevail.

Richard Lovely asked if noise standards are measured at the receiving property’s boundary. Mr. Bricklin said they are not necessarily at the property boundary. Due to the non-linear path noise travels, noise can be measured at different places.

Mr. Blumenfeld said he thinks EFSEC needs standards where there are none, and it may be possible to keep existing standards.

Mr. Krogh asked if the standards that currently exist are adequate. Mr. Bricklin said they are not; he said Ecology has not changed its noise standards in 20 years, and it does not even have a staff for standards at this time. Mr. Lufkin suggested that the group at least explore whether power plants have changed with regard to noise standards since Ecology established its standards in 1974.

Mr. Krogh asked if the group should try to develop new standards. Mr. Bricklin said that Ecology’s standards are antiquated. Toni Potter said if the group wants certainty, this needs to be dealt with.

Mr. Luce said it is in everyone’s interest to have standards that provide certainty where there is a void right now. Whether it is existing Ecology standards or Oregon standards, he hopes a proposed rule is developed through this group’s effort.

Rusty Fallis said that whatever rule EFSEC adopts, it is going to have to be rational. To simply accept Ecology’s standards just because they are existing state rules, in his opinion would be a thin rationale and not demonstrate the level of review and discussion that the Council expects would go into setting rules. Because Ecology’s standards are 20 years old, he suggests further analysis may be needed.

Mr. Krogh asked who would like to help Mr. Bricklin in drafting a proposed rule. Mr. Bailey offered his assistance.

Fish and Wildlife

Gary Sprague presented a memorandum prepared by Bill Frymire, outlining the Washington Department of Fish and Wildlife authorities for participating in EFSEC proceedings. The Department has a mandate to “preserve, protect, perpetuate, and manage” the fish and wildlife of the state. Fish and Wildlife participates in the review of

Exhibit B(5)—Report to Jim Luce, Chair, Washington Energy Facility Site Evaluation Council

March 27, 2002 EFSEC Standards Development Group Meeting Materials

Page 4 of 4

“EFSEC projects” as an expert in fish and wildlife protection and management. EFSEC statutes recognize the balancing of the need for energy facilities with the least adverse effects on the environment. Fish and wildlife standards may pertain to many species and habitat conditions. For this reason, and because the Department’s mandate to preserve and manage fish and wildlife is general in nature, it is difficult to set quantifiable standards.

Chuck Lean and others asked what, if anything, could EFSEC adopt specifically in regard to fish and wildlife. Mr. Sprague responded that it was possible that standards could be set with regard to fish screening and crossing streams. Ultimately, however, Mr. Sprague reiterated that there is no certain set of standards to adopt other than protecting fish. The goal, he said, is to not lose habitats. If habitats are affected, the Department would prefer to evaluate the impacts through scientific assessment, not regulations. Darrel Peeples responded that it would take a *lot* of work to develop standards in this area.

Allen Fiksdal asked if the group could think of a standard process that could be expected by parties who deal with this issue in siting power plants (something on paper the applicant could see). Mr. Blumenfeld said that if he were EFSEC, he would want to see if there was any way to narrow what comes before EFSEC in the adjudicative phase. Mr. Peeples mentioned that a mediation process after application may be helpful in alleviating some problems and giving direction to the parties, as opposed to a five-year research project effort to set standards. Mr. Lufkin added that even if mediation does not achieve resolution, issues can be narrowed down, and perhaps hearings shortened.

Mr. Fallis asked if there would be incentives to move parties into a mediation process, and if parties would be required to mediate. Mr. Krogh said in his experience time requirements are helpful in mediation processes, and the group working to draft a proposed rules would look further at whether mediation should be required, in addition to examining how the pre-hearing phase could be improved.

Mr. Peeples, Mr. Fallis, Mr. Lufkin, and Mr. Blumenfeld agreed to work on the mediation process. Mr. Sprague will work on substantive standards for fish and wildlife, with assistance from Mr. Krogh and Mr. Blumenfeld.

Water Quantity

Mr. Lean presented an outline of “Suggested EFSEC Standards for Water Rights” that he and Mike Lufkin prepared. Mr. Lean’s proposal would require applicants needing to use water for energy facilities to acquire either a 1) new water right, or 2) water rights which could be changed to meet the points of withdrawal, place of use, and purpose of use identified in the application. To get new water rights, there must be (1) available water, (2) beneficial use, (3) no harm to existing water rights, and (4) conditions not detrimental to the public interest. If changes are required, the applicant must provide EFSEC with a report of examination. The report of examination may be prepared by a consultant or by Ecology (although the applicant is then subject to conditions required by Ecology for priority processing). If EFSEC accepts the report of examination, the site certification agreement will include water use authorization. EFSEC preempts regulations under state law to get water rights.

Regarding substantive requirements, Mr. Lean suggested in his outline that EFSEC water use authorizations “(1) result in no net loss to any surface water body when compared to use of the water rights provided by the applicant; (2) meet all applicable minimum flow requirements established by regulation; and (3) not impair any other water right.” However, the “no net loss” and minimum flow requirements may be varied as required by public interest considerations.

After Mr. Lean reviewed the water rights outline, Dave Arbaugh asked what happens if EFSEC rejects a report of examination. Mr. Lean said he did not research what happens if an applicant is rejected totally. Mr. Krogh suggested drafters consider in all proposed rules the decision-making process that would apply to the acceptance or rejection of the report of examination. Charles Carelli suggested water conservancy rules be included in the standards.

Mr. Krogh said the next step will be to use Mr. Lean’s concept outline as a strawman proposal for each person (especially those persons with the Department of Ecology) to review and get back to Mr. Lean and Mr. Lufkin with comments in a few weeks. Then Mr. Lean and Mr. Lufkin will draft a proposed rule.

Next Meeting

In working toward a June 30, 2002, completion date, the following people agreed to work together in writing proposed rules for standards on their respective issues by the next meeting, Thursday, April 25, 2002: Chuck Blumenfeld and Grant Bailey (wetlands), Dave Bricklin and Grant Bailey (noise), Brian Carpenter (socio-economics), and Mike Lufkin and Dave Bricklin (air). Mr. Lean and Mr. Lufkin will draft a modified strawman proposal on water quantity. Mr. Peeples, Mr. Blumenfeld, Mr. Lufkin, and Mr. Fallis will work on a general mediation process for fish and wildlife, and Gary Sprague and Bud Krogh will look at fish and wildlife standards.

The April 25, 2002, meeting location is to be announced, as is the location of the following meeting, Thursday, May 9, 2002. The group will also meet Thursday, May 23, 2002, at St. Placid’s Priory and may meet twice in June.

March 27, 2002

EFSEC Standards Development Group

Meeting

Attendance

Richard Lovely
John Soden
Grant Bailey
Mike Lufkin
Charles Carelli
Dick Fryhling
Tony Ifie
Jim Boldt
Gary Sprague
Dave Arbaugh
Rusty Fallis
Allen Fiksdal
Mark Anderson
Victoria Lincoln
Chuck Blumenfeld
Justin Long
Mike Mills
Jim Luce
Bud Krogh
Chuck Lean
Donna Ewing
Toni Potter
Brian Carpenter
Sandi Swarthout
Tim Boyd
Kristen Sawin
Lee Faulconer
Colins Sprague
Dan Seligman
Darrel Peeples
Stuart Trefry
Dave Bricklin
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Exhibit B(5)—Report to Jim Luce, Chair, Washington Energy Facility Site Evaluation Council

March 27, 2002 EFSEC Standards Development Group Meeting Materials

Page 7 of 7

REVIEW OF NOISE STANDARDS FOR EFSEC “STANDARDS” WORK GROUP

Dave Bricklin

I have compiled summary information on the regulation of noise by Washington State, local jurisdictions within Washington State, and the State of Oregon. Excerpts of pertinent statutes and regulations are pasted in below and also are available through the web page links provided below.

WASHINGTON STATE REGULATIONS

In 1974, the Legislature enacted a noise control statute. The statute itself does not establish any objective substantive standards. It delegates substantive rule making to the Department of Ecology. The legislative findings state that:

Inadequately controlled noise adversely affects the health, safety, and welfare of the people, the value of property, and the quality of the environment. Anti-noise measures of the past have not adequately protected against the invasion of these interests by noise. There is a need, therefore, for an expansion of efforts state-wide directed toward the abatement and control of noise, considering the social and economic impact upon the community and the state. The purpose of this chapter is to provide authority for such an expansion of efforts, supplementing existing programs in the field.

RCW 70.107.010.

The State Legislature then delegated to the Department of Ecology the responsibility for developing noise standards. RCW 70.107.030. The Legislature provided DOE with only general direction, in these terms:

The Department, after consultation with state agencies expressing an interest therein, shall adopt, by rule, maximum noise levels permissible in identified environments in order to protect against adverse affects of noise on the health, safety, and welfare of the people, the value of property, and the quality of the environment; PROVIDED, THAT in so doing the Department shall take also into account the economic and practical benefits to be derived from the use of various products in each such environment, whether the source of the noise or the use of such products in each environment is permanent or temporary in nature, and the state of technology relative to the control of noise generated by all such sources of the noise or the products.

RCW 70.107.030(1).

Exhibit B(5)—Report to Jim Luce, Chair, Washington Energy Facility Site Evaluation Council

March 27, 2002 EFSEC Standards Development Group Meeting Materials

Page 8 of 8

The Legislature also provided that the standards set by Ecology were to preempt local standards unless there was a finding that different requirements were "necessitated by special conditions." RCW 70.107.060(3). Local standards are to be submitted to Ecology for review and approval. (If local standards are disapproved by Ecology, the local government can appeal to the Pollution Control Hearings Board. Id.)

The standards adopted by the Department of Ecology are found in Chapter 173-60 WAC. The standards are based on the type of property from which the noise is emitted and the type of property which receives the noise. The regulations establish three classes of property (A, B, and C). Class A are "lands where human beings reside and sleep." WAC 173-60-030(1)(a). Class B are "lands involving uses requiring protection against noise interference with speech" and typically include hotels and motels, retail property, and educational and religious establishments. WAC 173-60-030(1)(b). Class C are "lands involving economic activities of such a nature that higher noise levels than experienced in other areas is normally to be anticipated." WAC 173-60-030(1)(c). Examples include industrial and agricultural areas.

The regulations then establish a maximum dBA level in matrix form as follows:

EDNA OF NOISE SOURCE		EDNA OF RECEIVING PROPERTY	
	Class A	Class B	Class C
CLASS A	55dBA	57 dBA	60 dBA
CLASS B	57	60	65
CLASS C	60	65	70

WAC 173-60-040(2)(a).

The regulations provide that between the hours of 10:00 p.m. and 7:00 a.m. the noise limitations for receiving properties within Class A are reduced by 10 dBA.

The regulations also provide for a variety of short-term exceedences of the nominal maximum standards. WAC 173-60-040(2)(c).

The regulations also provide a long list of exemptions, WAC 173-60-050, but none of them appear to pertain to power generation facilities.

While the Legislature provides that generally Ecology's regulations preempt local regulations, Ecology's regulations include this statement:

Nothing in this chapter or the exemptions provided herein, shall be construed as preventing local government from regulating noise from any source as a nuisance. Local resolutions, ordinances rules or regulations regulating noise on such a basis shall not be deemed inconsistent with this chapter by the department.

WAC 173-60-060.

Local noise ordinances in Washington State show great variability in their treatment of noise. Some jurisdictions (e.g., City of Olympia, Lewis County, Pierce County, Skagit County) apparently do not address noise at all, relying exclusively on Ecology's regulations. Other jurisdictions (e.g., Clark County) have generic noise ordinances which prohibit "nuisance" noise (dogs barking and baying) and otherwise adopt Ecology's regulations. King County has adopted DOE's sending/receiving property matrix but with some slight modifications. See KCC 12.88.020 (distinguishing between rural residential and other residential properties and distinguishing between commercial and industrial properties).

EFSEC's standards for addressing noise are (ironically) silent. I believe the only place in which EFSEC's rules address "noise" is in the regulation specifying the content of a SCA application. That regulation provides that the applicant "shall describe the impact of noise from construction and operation and shall describe the measures to be taken in order to eliminate or lessen this impact." WAC 463-42-352(1). No standards, subjective or objective, are established.

In my limited review, I have found no state or local regulations in Washington that utilize a noise measurement system any more sophisticated than that relying purely on the dBA metric -- and many that are far less sophisticated or non-existent.

OREGON

In contrast to Washington's noise standards which either use the dBA metric or an amorphous "nuisance" standard, Oregon has employed a system that involves a more detailed analysis of potential noise impacts. An analogy might be that the Washington system attempts to determine the health of the patient simply by taking its temperature. Other measurements of "health" -- such as blood pressure, blood tests -- are ignored. Oregon's system involves an analysis of additional methods of measuring noise. Without getting into all the scientific details, suffice it to say that the Oregon regulations involve a much finer analysis of the different components of "noise," and establish regulations that are much more finely attuned to those scientific nuances.

I am attaching a link to the Oregon website where the regulations can be found. http://arcweb.sos.state.or.us/rules/OARS_300/OAR_340/340_035.html The regulations specific to "industry and commerce" are found at OAR (Oregon Administrative Rules) 340-035-0035. Tables 7 and 8 (referenced in the regulations) can be found at this website: <http://www.deq.state.or.us/about/division35table7-8.pdf>. Tables 9 and 10 (referenced in the regulations) can be found at this website: <http://www.deq.state.or.us/about/division35table9-10.pdf>.

Table 10, in particular, provides a far more sophisticated method for assessing (and establishing limits) noise impacts than anything I have seen in Washington State.

While the Oregon regulations are more refined than Washington's, the Oregon standards do not address all the scientific nuances of the noise issue. Among other things, they do not address the troubling aspect of bothersome noise known as tones. Industrial equipment that meets various decibel-based noise standards can still emit tones which can be very disturbing to the human ear, disrupting sleep and other quiet activities. Noise standards, quantifiable or subjective, should address tones as well as the full frequency range of noise.

OUTLINE OF SUGGESTED EFSEC “STANDARD” FOR WATER RIGHTS

Chuck Lean and Mike Lufkin

I. Procedure.

- A. Applicants proposing to use water for an energy facility must either acquire a new water right or acquire water rights which can be changed to meet the point(s) of withdrawal, place of use and purpose of use identified in the application. The water rights should be identified in the application. If a site certification authorizing water use is issued, then the identified water rights will be held in abeyance during the life of the site certification.**
- B. If the applicant can acquire a water right which is suitable for use without change, then the only requirement is to identify that water right in the application.**
- C. If changes are required, then the applicant must provide to EFSEC a report of examination identifying the changes to be made and the quantities of water (both in gallons per minute and acre feet per year) which are eligible to be changed, together with any limitations on time of use.**
- D. The report of examination may be prepared by Ecology, in which case the applicant shall meet any other conditions required by Ecology necessary to obtain priority processing by that agency.**
- E. Alternatively, the report of examination may be prepared by a consultant retained by the applicant, in which event the applicant is not required to comply with Ecology’s requirements relating to priority of processing.**
- F. If EFSEC accepts the recommendations in the report of examination, then an appropriate water use authorization shall be included in the site certification agreement. The water rights which formed the basis for that authorization shall be attached to the site certification agreement and held in abeyance during the life of that agreement. The terms and conditions of water use, however, shall be those set forth in the site certification agreement.**

II. Substantive Requirements.

- A. Water use authorizations issued by EFSEC shall: (1) result in no net loss to any surface water body when compared to use of the water rights provided by the applicant; (2) meet all applicable minimum flow requirements established by regulation; and (3) not impair any other water right.**
- B. The “no net loss” and minimum flow requirements in II. A. above may be varied in the event that EFSEC determines that such variance is necessary due to overriding considerations of public interest. In no event shall EFSEC authorize use of water which will impair any other water right (except the right inherent in a minimum flow requirement).**
- C. EFSEC may require any other water resource or watershed enhancements which it determines are necessary to meet the requirements of chapter 80.50 RCW.**



Christine O. Gregoire

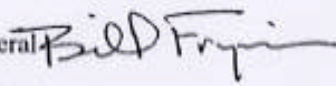
ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

MEMORANDUM

March 27, 2002

TO: Jim Luce, Chair, EFSEC

FROM: William C. Frymire, Assistant Attorney General 

SUBJECT: **WDFW Authorities In EFSEC Proceedings**

You have requested information regarding the statutory authorities the Washington Department of Fish and Wildlife (Department) asserts when it participates as an intervenor in proceedings before the Energy Facility Site Evaluation Council (EFSEC).

The Department's statutory authorities are generally found in Title 77 RCW. Wildlife, fish, and shellfish are generally the property of the state. RCW 77.04.012. The Department has a mandate to "preserve, protect, perpetuate, and manage" the fish and wildlife of the state. *Id.* The Department shall conserve the fish and wildlife resources in a manner that does not impair the resource. *Id.*

The Director of the Department shall "investigate the habits and distribution of the various species of wildlife native to or adaptable to the habitats of the state." RCW 77.12.020(1). The Fish and Wildlife Commission shall determine whether a species of fish or wildlife should be managed by the Department and, if so, categorize that species into a classification. *Id.* For the protection and management of wildlife species, the Department has created a number of classifications; for example, protected species (RCW 77.12.020(5)), game animals and fur bearing animals (RCW 77.12.020(2)), game birds and predatory birds (RCW 77.12.020(3)), game fish and food fish (RCW 77.12.020(4)), endangered species (RCW 77.12.020(6)), and deleterious exotic wildlife (RCW 77.12.020(7)).

In the context of EFSEC siting proceedings, the Department participates as the state's expert in fish and wildlife science and in fish and wildlife protection and management.¹ The Department participates in EFSEC proceedings to provide the information necessary to assist EFSEC and the Governor in completing their duties and mandates. By RCW 80.50.010, the legislature recognizes the many issues and interests involved in the siting of new energy facilities.²

¹ As noted above the legislature has vested the duty to investigate, protect and manage the state fish and wildlife resources in the Department. The legislature has appointed a Department representative to EFSEC as a standing member (RCW 80.50.030(3)), and EFSEC rules generally make the Department a party of right regarding fish and wildlife issues. WAC 463-30-050. Lastly the Department is recognized by SEPA as an expert regarding natural resource issues. WAC 197-11-920.

² The legislature recognizes growth in energy demand requires a procedure for decision making regarding the siting of future projects, in part because they significantly "impact the welfare of the population, the location and growth of industry and the use of the natural resources of the state." RCW 80.50.010



Washington state EFSEC policy recognizes the need for new energy facilities balanced with the need to locate and operate such facilities where they will produce minimal adverse effects on the environment, the ecology of the land and its wildlife, and the ecology of the state waters and their aquatic life. RCW 80.50.010. EFSEC's balancing of the need for a new facility with the broad interests of the public is to be based on a number of premises, specifically including:

To preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment. RCW 80.50.010(2).

The Department's participation in adjudicative proceedings provides EFSEC information about the existing character of the environment and the potential for impacts resulting from an applicant's proposal. Information provided by the Department assists EFSEC in its duty to consider and balance the principles noted in the policies and premise above.

The Department also assists EFSEC through participation through the State Environmental Policy Act (SEPA) process. The Department is recognized as having special expertise regarding the subjects of water resources and water quality, hazardous/toxic substances and solid and hazardous waste, fish, wildlife, natural resources, land use and management, and recreation. WAC 197-11-920. For the purposes of SEPA, the Department is an "agency with jurisdiction" for construction projects in state waters that require a Hydraulic Project Approval. WAC 197-11-714. The Department uses its expertise to assist EFSEC's SEPA process by providing scoping comments and commenting on environmental documents.

In addition to the Department's broad mandates and duties identified in the above paragraphs, the Department has a number of specific statutes which provide the Department specific direction regarding particular wildlife species, habitats, or certain other situations. While EFSEC's statutes may preempt direct application of these statutes, the Department brings the information and requirements to the attention of EFSEC. While EFSEC might not be directly subject to these provisions, EFSEC's recommendations necessarily take these situations into account through conditions in any recommended Site Certification Agreement. RCW 80.50.100(1).

The Department has a number of statutes that apply to the construction of projects in waters of the state, and these statutes are generally found in chapter 77.55 RCW. EFSEC proposals which contain "in water construction" elements are likely to raise some or all of these four different, but related, statutory schemes: 1) the need to address fish guards (screens) on water diversion devices (RCW 77.16.220 and 77.55.040); 2) the need to consult with the Department regarding applications to divert or store water (water rights applications) (RCW 77.55.050); 3) the need to address fish ways through dams or other obstructions (RCW 77.55.060); and 4) the need to obtain a Hydraulic Project Approval, which generally addresses timing, methods, practices, and mitigation for construction of projects in state waters (RCW 77.55.100). Chapter 77.55 RCW contains additional statutes, which provide either special cases of the above situations or other related special provisions.

The Department applies a number of statutes, which address a particular species or habitat condition. For example, RCW 77.12.035 directs that the Department "protect grizzly bears and develop management plans on publicly owned lands that will encourage the natural

March 27, 2002
Page 3

regeneration of grizzly bears in areas with suitable habitat." The Department is to take specific actions to protect bald eagles and their habitats. RCW 77.12.650 and 77.12.655. The Department is to enhance the eastern Washington pheasant populations and habitats. RCW 77.12.820 and 77.12.790. The legislature has provided a number of directives to protect and increase the cold and warm water fish resources of the state. RCW 77.44, RCW 77.85, RCW 77.95, RCW 77.100, RCW 77.105, and RCW 77.12.710. The Department also has several statutory mandates to protect, manage and enhance shellfish resources. RCW 77.60.030, 77.60.040, and 77.60.100.

Lastly the Department has statutes which direct it to protect or take actions regarding specific or regional locations. For example, RCW 77.55.160 identifies a reach of the Columbia River, including tributaries, as an anadromous fish sanctuary, and it generally prohibits the damming or creating of other obstructions to fish passage. The Department is to cooperate with its Oregon counterpart to protect and manage the wildlife found in border areas. RCW 77.12.325.

While the above discussion of the statutory bases for the Department of Fish and Wildlife's participation in EFSEC proceedings may not be exhaustive, it covers the general provisions and the scope of specific mandates. I trust this information will be of benefit to you. If you have questions about these particular statutes, please do not hesitate to contact me (360 586-2428).

WETLAND REGULATION

I. Regulatory Authority

A. Federal

1. Section 404 of the Clean Water Act [33 U.S.C. 1344]
 - a. Corps of Engineers [33 C.F.R. Part 320 et seq.]
 - (1) Permit required or discharges of dredged material into "navigable waters."
 - b. EPA
 - (1) EPA regulations govern Corps process [40 C.F.R. Part 320]
 - (2) Veto authority over Corps permit
 - c. Endangered Species Act concurrence

B. State of Washington

1. No comprehensive state wetlands regulations
2. State must certify the following with regard to Corps permits:
 - a. consistency with state coastal zone management program (i.e. State Shoreline Management Act) [16 U.S.C. 1456]
 - b. compliance with state water quality standards [33 U.S.C. 1341]
3. For non-EFSEC projects, the Department of Ecology provides state certification
4. For EFSEC projects, EFSEC provides state certification

C. Local Government

1. Local governments regulate wetlands primarily under the following:
 - a. State Growth Management Act [chapter 36.70 RCW]

(1) Act requires local governments to designate and protect wetlands as part of critical area regulation

b. State Shoreline Management Act [chapter 90.58 RCW]

(1) Local shoreline master programs have jurisdiction over wetlands associated with lakes, streams and tidal waters

II. Issues

A. Delineation of Wetlands

B. Authority to Fill

1. Corps uses three-step approach:

- a. have impacts been avoided to the maximum extent practicable?
- b. have unavoidable impacts been minimized to the extent appropriate and practicable?
- c. has appropriate mitigation been provided for unavoidable impacts that cannot be minimized?

2. Alternative Analysis

C. Role of Ecology in EFSEC projects.